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**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Department of the Navy--Modification of Remedy

**File:** B-274944.4

**Date:** July 15, 1997

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John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, P.L.C., for the protester.

Eric A. Lile, Esq., Kathy B. Cowley, Esq., and Brian F. Zeck, Esq., Department of the Navy, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Where a contracting agency overrides a statutorily required stay of contract performance by executing a "best interests" justification, General Accounting Office must recommend corrective action without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

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### **DECISION**

The Department of the Navy requests modification of the remedy that we recommended in Dynalantic Corp., B-274944.2, Feb. 25, 1997, 97-1 CPD ¶ 101, in which we sustained Dynalantic's protest against the award of a contract to Marine Safety International (MSI) under request for proposals (RFP) No. N00600-96-R-0749, issued by the Navy for ship handling simulation services.

We deny the request.

In our decision, we found that the Navy had improperly excluded Dynalantic's proposal from the competitive range. The solicitation called for the contractor to perform essentially four steps: (1) construct a ship handling facility on government-owned property within 9 months from contract award; (2) install and configure the simulator equipment and training stations; (3) provide all personnel and technical services necessary to run the ship handling simulator complex for a period of up to 10 years; and (4) "[u]pon completion or termination of the contract [be] responsible for the removal of the building and restoration of the grounds to original condition at no additional cost to the government." In sustaining Dynalantic's protest, we recommended that the Navy reinstate Dynalantic's proposal in the competitive range, conduct discussions, and solicit best and final offers (BAFO). In the event Dynalantic was selected for award, we recommended that the Navy allow MSI to

complete its construction of the ship handling facility (which we understood to be nearly complete), and award the remainder of the procurement to Dynalantic.

The Navy requests modification of our recommendation on the ground that the recommendation is impracticable. The Navy first argues that because the solicitation does not require the contractor to give the agency title to the ship handling facility, it will be difficult for the agency to obtain access to the facility for use by another contractor. The Navy also states that if it awards the non-facility portion of this requirement to Dynalantic, it will be required to terminate MSI's current contract, which, under the above-referenced "termination" clause, will require MSI to remove the newly constructed facility, resulting in great expense and delay to the government. In this regard, the Navy speculates that if Dynalantic is selected for award after the latest round of BAFOs, the total cost involved in terminating MSI's current contract; securing access to the constructed facility for the ship handling complex; and awarding the remaining portion of the ship handling services requirement to Dynalantic may be so high that the agency "may not be able to afford" to carry out our recommendation. The Navy also asserts that any delay in procuring the simulator ship handling facility and associated services will "interfer[e] with, and perhaps foreclos[e] the ability of the Navy to meet its mission of the safe and effective operation of ships."

Under the Competition in Contracting Act of 1984 (CICA), as amended, if the procuring agency receives notice of a protest filed at this Office within 10 calendar days of the contract award, or 5 calendar days after the debriefing date, the agency generally is required to suspend contract performance while the protest is pending. 31 U.S.C. § 3553(d)(3)(A), (d)(4) (1994). However, if an agency determines that notwithstanding the pending protest at our Office, performance of the contract is "in the best interests of the United States" or that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision" of our Office on the protest, the agency may execute a written finding authorizing the awardee to proceed with contract performance and thereby override the CICA stay. 31 U.S.C. § 3553(d)(3)(C)(i).<sup>1</sup>

In this case, on November 14, 1996, shortly after Dynalantic's protest was filed, the Navy determined that it was in the best interests of the government to continue performance notwithstanding the protest and executed a written "best interests" override of the statutory stay on MSI's contract performance. Where, as here, the head of a procuring activity decides, under 31 U.S.C. § 3553(d)(3)(C)(i)(I), to continue performance of a protested contract based on a finding that to do so would be in the best interests of the government, CICA requires our Office to make our recommendation "without regard to any cost or disruption from terminating,

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<sup>1</sup>In addition to executing a written determination to override the stay, the agency is required to notify our Office of the override finding. 31 U.S.C. § 3553(d)(3)(C)(ii).

recompeting, or reawarding the contract."<sup>2</sup> 31 U.S.C. § 3554(b)(2); 4 C.F.R. § 21.8(c); Price Waterhouse--Recon., B-220049.2, Apr. 7, 1986, 86-1 CPD ¶ 333 at 7. Although the Navy contends that nothing in the statutory language precludes our Office from considering the impact of our recommendation on the Navy's mission, the Conference Report accompanying the statutory language makes it clear that assessing whether a corrective action recommendation will positively or negatively impact the procuring agency is not to be considered by our Office when fashioning a corrective action recommendation in the case of a "best interests" stay override:

Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest . . . the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained. This is to insure that if the Comptroller General sustains a protest, such forms of relief as termination, recompetition, or re-award of the contract will be fully considered for recommendation. Agencies in the past have resisted such recommendations on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved. This provision is designed to preclude that argument in the future, and thus to avoid prejudicing those relief measures in the Comptroller General's review.

H.R. Conf. Rep. No. 98-861, at 1436 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 2124.

As evidenced by the clear language of 31 U.S.C. § 3554(b)(2) and its legislative history, neither the purported disruption to the Navy's mission nor the agency's unsubstantiated funding concerns<sup>3</sup> provide a basis for modifying our recommended

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<sup>2</sup>Alternatively, if the agency overrides the CICA stay based upon a written finding of urgent and compelling circumstances, CICA permits our Office to consider all circumstances--including cost and disruption to the government--in fashioning the appropriate remedy under a sustained protest. See 31 U.S.C. § 3554(b)(1); 4 C.F.R. § 21.8(b) (1997); Arthur Young & Co., B-216643, May 24, 1985, 85-1 CPD ¶ 598 at 7-8 (termination of awardee's contract not recommended where agency overrode the stay of contract performance on the basis of urgent and compelling circumstances, and the high cost of termination was out of proportion to any benefits received from termination).

<sup>3</sup>Although the Navy has suggested that it "may not be able to afford" to make award to Dynalantic because of the costs associated with terminating MSI's contract, there is no basis in the record for concluding that this procurement involves unusually  
(continued...)

corrective action in view of the Navy's decision to override the statutory stay of performance based on a "best interests" determination.<sup>4</sup> Virginia Beach Air Conditioning Corp., 69 Comp. Gen. 178, 181 (1990), 90-1 CPD ¶ 78 at 5.

The request for modification of remedy is denied.

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<sup>3</sup>(...continued)

high termination or reprocurement costs. Moreover, the Navy has made no attempt to quantify the costs involved or to show that the necessary funds are not available. Nor is there any reason to believe that, if termination of MSI's contract is appropriate after the reevaluation is performed, the Navy and MSI could not enter into good faith negotiations to resolve the issues relating to use of the facility.

<sup>4</sup>During the protest, the Navy advised our Office and the parties that MSI's progress on the construction portion of the requirement was quite substantial. In its request for modification, the Navy now asserts that our Office was mistaken in concluding that the facility's construction was "nearly complete." Our review of the record shows that we reasonably concluded that the construction phase was near completion. In any event, the stage of construction has no bearing on our basic recommendation that the Navy hold discussions; solicit new BAFOs; conduct a reevaluation; and, if Dynalantic is selected, award whatever portion of the contract remains unperformed.